

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

LOOP AI LABS INC,  
Plaintiff,

v.

ANNA GATTI, et al.,  
Defendants.

Case No. [15-cv-00798-HSG](#) (DMR)

**ORDER ON DEFENDANT  
ALMAWAVE'S SANCTIONS MOTIONS**

Re: Dkt. Nos. 546, 597, 895

Defendant Almaxwave USA, Inc. ("Almaxwave")<sup>1</sup> filed three discovery motions seeking sanctions for Plaintiff Loop AI Labs Inc.'s conduct and/or failure to comply with discovery orders. [Docket Nos. 546, 597, 895.] The court held a hearing on October 31, 2016 and rules as follows.

**I. DOCKET NO. 546: FAILURE TO COMPLY WITH ORDER TO PAY  
INTERPRETER COSTS FOR JANUARY 20, 2016 DEPOSITION**

To resolve an emergency discovery dispute that arose at the commencement of the January 20, 2016 deposition of Mariantonietta Perri, the court ordered the parties to split the cost of the Italian language interpreter for that day. The court further ordered Plaintiff to provide an interpreter for all of the Italian-speaking deponents scheduled to be deposed the rest of that week, since the Almaxwave Defendants had put Plaintiff on notice of their need for translation services. The court ordered Plaintiff to bear the full interpreter costs for the depositions scheduled for the rest of the week, but noted that Plaintiff reserved the right to seek reimbursement for those costs "if it [could] show that such services were unnecessary." [Docket No. 397 (Jan. 20, 2016 Court Order re Interpreter Services).] Plaintiff never sought reimbursement.

On February 3, 2016, the interpreter billed Plaintiff for its 50% share of the January 20,

<sup>1</sup> The court refers to Defendants Almaxwave USA, Inc., Almaxwave S.p.A. and Almaxwave S.r.l. collectively as "the Almaxwave Defendants."

2016 translation services in the amount of \$844.50. [Docket No. 546 Ex. A (Docket 654-1 at 6).]

In the present motion, Almawave contends that Plaintiff refused to pay the invoice and asks the court to order Plaintiff to immediately comply with the January 20, 2016 order. Almawave asserts that its law firm, which originally retained the interpreter, was “forced to pay the fees that this Court ordered be paid by Loop” in order to preserve its relationship with the interpreter. [Docket No. 546 at 2.] Almawave also asks the court to impose unspecified “further monetary sanctions on Loop or its counsel and/or issue an OSC regarding further sanctions as punishment and deterrence of future contempt.” [Docket No. 546 at 2.]

On October 31, 2016, shortly before the hearing on this motion, Plaintiff submitted a declaration from the translation agency that directly contradicts Almawave’s assertion. Although Almawave represented in its motion that its counsel paid the entire bill for the January 20, 2016 interpreter services, the agency states that Almawave’s counsel only paid for its own 50% share. The agency declares that it received a \$630 payment from Plaintiff’s counsel on June 10, 2016.<sup>2</sup> [Docket No. 928.] At the hearing, Almawave’s counsel acknowledged that the representation in its motion was incorrect. Almawave’s counsel corrected the record by stating that he told the translation agency that his firm would pay Plaintiff’s share if Plaintiff did not pay the invoice. [Docket No. 946 (Oct. 31, 2016 Hr’g Tr. at 54-55.)] He did not otherwise explain the misrepresentation in the motion.

In any event, Plaintiff’s conduct is not sanctionable. Although Plaintiff did not promptly pay the interpreter’s invoice, the court’s January 20, 2016 order directing Plaintiff to pay for half of that day’s interpreter costs did not contain a deadline by which it was required to do so. Thus, its June 10, 2016 payment, while tardy, did not violate a court order. The basis for Almawave’s request for unspecified “further monetary sanctions” and/or an order to show cause regarding further sanctions is not clear, and Almawave does not specify the authority supporting its request. Its motion for sanctions is therefore denied.

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<sup>2</sup> Plaintiff does not explain the \$214.50 discrepancy between the \$844.50 billed by the translation agency and the amount Plaintiff paid.

**II. DOCKET NO. 597: FAILURE TO COMPLY WITH COURT ORDER RE DEPOSITION SCHEDULE FOR LATE MARCH 2016**

On March 25, 2016, four days before the March 29, 2016 fact discovery deadline, the court held an emergency telephonic discovery hearing and set a deposition schedule for the following week for the remaining witnesses, which included Plaintiff's three executives, Calafiore, Ehlen, and Peintner. [Docket No. 526.] The court ordered Calafiore and any Rule 30(b)(6) witness testifying on Plaintiff's behalf to appear on March 31, 2016 and April 1, 2016. It ordered Plaintiff to produce Ehlen and Peintner for depositions on March 29, 2016 and March 30, 2016. *Id.*

On March 26, 2016, Plaintiff moved for relief from that order. [Docket No. 529.] Judge Gilliam denied Plaintiff's motion on March 28, 2016. [Docket No. 533.] Peintner appeared for deposition on March 30, 2016; however, Ehlen, Calafiore, and Plaintiff's 30(b)(6) witnesses failed to appear for deposition as ordered. On April 1, 2016, Almaxwave filed an administrative motion for leave to file a motion for sanctions based on Plaintiff's witnesses' failure to appear for the depositions. [Docket No. 555.] Following receipt of Almaxwave's administrative motion and Plaintiff's response thereto (Docket No. 558), the court ordered Plaintiff to make its witnesses available for deposition during the week of April 4, 2016 at Almaxwave's convenience, and granted Almaxwave leave to file a motion for sanctions. [Docket No. 564.] Almaxwave now moves for sanctions for Plaintiff's failure to comply with the March 25, 2016 court order regarding the depositions of its witnesses.

At the hearing on this motion, Almaxwave clarified that it eventually deposed Ehlen and Calafiore, and that it did not incur any additional costs related to their original failure to appear as ordered (e.g., extra court reporter or videographer fees). Therefore, the only expenses related to Plaintiff's failure to comply with the court's order are the attorneys' fees and costs incurred by Almaxwave in filing the April 1, 2016 administrative motion for leave to move for sanctions and the present motion for sanctions. Oct. 31, 2016 Hr'g Tr. at 24, 26. Inexplicably, Almaxwave does not seek reimbursement for the costs of those motions. Instead, it asks for unspecified "meaningful sanctions" as well as "a monetary component of at least \$5,000" pursuant to Rule 37(b), which authorizes various sanctions for failure to obey an order to provide or permit discovery. Fed. R. Civ. P. 37(b)(2)(A); Mot. at 2. It does not cite any other authority for its

request.

Almawave's motion for sanctions is denied. The only prejudice or injury it suffered as a result of Plaintiff's disobedience of the court's order was the cost of its motions, but it did not seek an award tied to those expenses.

This outcome does not condone Plaintiff's refusal to follow a court order. Far from it. Sadly, Plaintiff's failure in this instance joins a long line of such failures. [*See* Docket No. 894, Order to Show Cause Why Terminating Sanctions Are Not Warranted (listing examples of Plaintiff's "documented history of obstructionist discovery conduct and persistent refusal to follow Court orders notwithstanding repeated warnings.").]

### **III. DOCKET NO. 895: REIMBURSEMENT OF LUCA FERRI'S COSTS**

Almawave moves for sanctions related to its witness Luca Ferri. At a three-hour discovery hearing on December 10, 2015, the parties argued at length about the timing and location of depositions of the Almawave Defendants' witnesses, many of whom live in Rome. Dec. 10, 2015 Hr'g Tr. at 42:15-56:3; 111:2-125:7. After much discussion, the court ordered that the depositions of the Italian witnesses take place in San Francisco between January 19 and 22, 2016. *Id.* at 124:10-14.

As discussed above in connection with Docket No. 546, on January 20, 2016, at the start of the first Italian witness's deposition, the parties sought emergency court intervention regarding a dispute about the use of an interpreter. Among other things, the court ordered Plaintiff to provide an interpreter for all of the Italian witnesses scheduled to be deposed that week. [Docket No. 397 (Jan. 20, 2016 Court Order re Interpreter Services).]

Ferri is a native Italian language speaker who lives and works in Italy. He traveled to San Francisco on January 13, 2016 in order to prepare for his deposition. Plaintiff noticed Ferri's deposition for January 21, 2016, beginning at 8:00 a.m. [Docket No. 895-1 (Wallerstein Decl. Sept. 26, 2016) ¶¶ 4, 10.] In a January 9, 2016 letter, Almawave objected to the start time due to personal obligations and sought a 10:00 a.m. start time as a courtesy. *Id.* at ¶ 10. Almawave sent a second letter on January 17, 2016 reiterating its unavailability at 8:00 a.m., but Plaintiff refused any accommodation. *Id.* Defense counsel was ultimately able to make alternate arrangements and

1 informed Plaintiff that Almarwave's witnesses would appear at 9:00 a.m. *Id.*

2 Plaintiff noticed two depositions for January 20, 2016: Mariantonietta Perri and Angela  
3 Nicolella. *Id.* at ¶ 11. Plaintiff deposed Perri on January 20, 2016, but did not depose Nicolella.  
4 Almarwave agreed to re-produce Nicolella for deposition on January 21, 2016. *Id.* Ferri and  
5 Nicolella appeared for deposition on January 21, 2016, along with two defense attorneys in order  
6 to facilitate the possibility of double-track depositions. *Id.* at ¶ 13. However, Plaintiff did not  
7 come prepared with an interpreter, and informed Almarwave that one would not arrive until later  
8 that day. *Id.* at ¶ 12; Wallerstein Decl. Ex. C (Nicolella Tr.) at 7, 12.

9 Nicolella's deposition did not begin until approximately 11:15 a.m., after the interpreter  
10 arrived. At approximately 2:50 p.m., Almarwave's counsel reconfirmed on the record that Ferri  
11 was present, ready to be deposed, and would not be available for deposition the next day.  
12 Nicolella Tr. at 64-65. Almarwave's counsel also stated that the day's depositions would end by  
13 no later than 7:00 p.m. *Id.* at 65. After 7:00 p.m., Ferri left the deposition room without having  
14 been deposed. *Id.* at 155-56. He flew back to Italy as planned on January 22, 2016. Wallerstein  
15 Decl. ¶ 15. On February 12, 2016, Almarwave filed an administrative motion for leave to file a  
16 motion for reasonable expenses for Plaintiff's failure to depose Ferri as noticed (Docket No. 419),  
17 which Plaintiff opposed (Docket No. 429). The court subsequently granted Almarwave leave to  
18 file its motion. [Docket No. 893.]

19 Almarwave moves pursuant to Federal Rule of Civil Procedure 30(g) for reimbursement of  
20 its expenses related to Ferri's travel to San Francisco and preparation for the deposition, as well as  
21 expenses related to this motion. Rule 30(g) provides that "[a] party who, expecting a deposition to  
22 be taken, attends in person or by an attorney may recover reasonable expenses for attending,  
23 including attorney's fees, if the noticing party failed to . . . attend and proceed with the  
24 deposition." Fed. R. Civ. P. 30(g)(1). Almarwave asks for an award of \$16,979.85.

25 It is undisputed that Plaintiff noticed Ferri's deposition for January 21, 2016 in San  
26 Francisco, but did not proceed with it. Plaintiff argues that it did not "fail to proceed" under Rule  
27 30(g), because Plaintiff's counsel was ready to go forward with Ferri's deposition at the appointed  
28 time and throughout the day. This plainly ignores the fact that the court had ordered Plaintiff to

1 provide an interpreter for the Italian-language witnesses, and it is undisputed that Plaintiff did not  
2 have an interpreter available at the start of Ferri's deposition. Therefore, counsel was not in fact  
3 ready to proceed with Ferri's deposition as noticed.

4 Plaintiff focuses its opposition on disputing Almarwave's characterization of events. First,  
5 Plaintiff argues that it did not know until the morning of January 21, 2016 that Almarwave would  
6 be producing Nicolella for her deposition on the same date. [Docket No. 903-1 (Healy Decl.,  
7 Sept. 30, 2016) ¶ 13.] There was only one witness noticed for deposition that day—Ferri—and  
8 Plaintiff asserts that the new schedule requiring the deposition of two witnesses on January 21,  
9 2016 "was entirely of [defense counsel's] creation. *Id.* Second, Plaintiff asserts that the only  
10 reason Nicolella was not deposed on January 20, 2016 as noticed was because counsel "abruptly  
11 left the deposition site with the witness, even though an interpreter was present." *Id.* at ¶ 11.<sup>3</sup>  
12 Third, Plaintiff asserts that defense counsel never identified any personal obligations that  
13 prevented the depositions from starting at 8:00 a.m., and argues that the reason the depositions  
14 needed to start at 8:00 a.m. was because the parties had limited time to take five depositions in  
15 three days.<sup>4</sup> *Id.* at ¶ 10. Fourth, Plaintiff asserts that defense counsel imposed repeated  
16 unreasonable breaks during Nicolella's deposition, "intentionally [trying] to limit the remaining  
17 deposition time."<sup>5</sup> [Docket No. 903 at 2.]

18 All of these arguments are a side show. They do not explain or justify Plaintiff's failure to  
19 depose Ferri as noticed, even though he had traveled from Italy. Plaintiff was on ample notice that

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21 <sup>3</sup> It appears that Wallerstein left the deposition site with Nicolella at approximately 5:13 p.m.  
22 [Docket No. 429-1 at 163.]

23 <sup>4</sup> Plaintiff contends that proceeding with a translator is an "extremely cumbersome and lengthy  
24 process." [Docket No. 903 at 2.] The court agrees that the process takes longer than usual, but  
25 had accounted for the possibility of delay by granting Plaintiff an extra three hours of  
jurisdictional depositions in order to "pad it a little bit because of possible need for translation."  
Dec. 10, 2015 Hr'g Tr. at 50.

26 <sup>5</sup> Plaintiff attempts to incorporate by reference its opposition to Almarwave's administrative  
27 motion for leave to file a motion to recover expenses associated with Ferri, which includes a chart  
28 of the deposition time spent waiting, in recess, and in colloquies on the record. [Docket No. 903  
at 1 (referring to Docket Nos. 429, 429-1).] The court declines to consider these materials, for  
they are a transparent attempt to skirt the page limit set by the court. [See Docket No. 893.]

the Italian-language witnesses all required an interpreter, but inexplicably failed to have one in place for the very first witness on January 20, 2016. This led to a discovery dispute and the need for emergency court intervention, which ultimately delayed the day's depositions and threw the entire schedule off track from the get-go. Even after the court's January 20, 2016 order requiring Plaintiff to provide interpreters for all other depositions taking place that week, Plaintiff did not have an interpreter ready to go on January 21, 2016 until well after 11:00 a.m. In this way, Plaintiff was the sole author of its time management problems, and created its own crises in a tightly scheduled week. It must now face the consequences of its poor planning and decisions.

Plaintiff also argues that Almaxwave USA, Inc. lacks standing to move for sanctions, since it provided no evidence that it incurred any of the expenses it seeks to recover here. Specifically, Plaintiff argues that Ferri is an employee of Almaxwave S.r.l., not Almaxwave USA, Inc., so Almaxwave USA, Inc. has no obligation to pay or reimburse Ferri's expenses. Further, Plaintiff argues that Almaxwave USA, Inc. has no fee arrangement with Venable; instead, its letter of engagement is with Almaxviva S.p.A. Healy Decl. ¶ 24. It contends that Almaxwave USA, Inc. has no standing to recover these expenses, since it did not incur or pay anything, and has no obligation to pay any of the expenses described in its motion.

In response, defense counsel explained at the hearing that the Italian Almaxwave Defendants conducted discovery under the auspices of Almaxwave USA, since they were concerned that proceeding otherwise could be construed as a waiver of their jurisdictional challenge. Oct. 31, 2016 Hr'g Tr. at 9-10, 11.<sup>6</sup> That challenge was not finally resolved until June 8, 2016, when Judge Gilliam denied the Italian Almaxwave Defendants' motion to dismiss the second amended complaint for lack of personal jurisdiction. [Docket No. 726.] Defense counsel asserted that the Almaxwave Defendants "never made a distinction between Almaxwave USA and the Italian Almaxwave Defendants for purposes of those depositions," treating them as depositions of all three entities. Oct. 31, 2016 Hr'g Tr. at 26-27. Almaxwave USA moved for leave to file a

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<sup>6</sup> Defense counsel stated, "[s]imply by submitting written responses the concern was that we would—more than a concern. We were told we would face an argument that that was a waiver of their jurisdiction challenge." Oct. 31, 2016 Hr'g Tr. at 9. Plaintiff did not refute this assertion.



1 motion for sanctions related to Ferri's deposition well before Judge Gilliam decided the  
2 jurisdictional issue. In light of these circumstances, the court finds that Almaxwave USA has  
3 standing to seek relief related to Ferri's scheduled deposition.

4 Almaxwave seeks a total of \$16,979.85 for the following expenses: Ferri's airfare and hotel  
5 accommodations; attorney time for deposition preparation; attorney time for attendance at the  
6 deposition; attorney time spent meeting and conferring, conducting legal research and preparing  
7 its motion for leave to file a motion for sanctions; and attorney time spent preparing its motion for  
8 sanctions. The court finds that Almaxwave is entitled to some but not all of the amounts requested.  
9 Almaxwave is entitled to reimbursement of Ferri's airfare and hotel accommodations.<sup>7</sup> Pursuant to  
10 Rule 30(g), it is also entitled to attorneys' fees incurred in preparing Ferri for deposition and  
11 appearing with him for his deposition on January 21, 2016.

12 However, the court denies Almaxwave's request for attorney time relating to its sanctions  
13 motion. In its original motion for leave to file a motion for sanctions, Almaxwave did not seek  
14 leave to recover such fees. Moreover, its request finds no support in the plain language of Rule  
15 30(g), which provides that "[a] party who, expecting a deposition to be taken, attends in person or  
16 by an attorney may recover reasonable expenses for attending, including attorney's fees, if the  
17 noticing party failed to . . . attend and proceed with the deposition." Fed. R. Civ. P. 30(g)(1).  
18 Finally, Almaxwave submitted no authority supporting this request.

19 Almaxwave submitted a copy of an email confirmation of Ferri's roundtrip flight to San  
20 Francisco for his deposition which shows the total cost of €833.82 or \$907.03, (Wallerstein Decl.  
21 Ex. A), but did not submit proof of payment of this sum, such as a credit card receipt.  
22 Additionally, although Almaxwave requests a total of \$5,407 in attorneys' fees for 12 hours of  
23 attorney time spent preparing Ferri for deposition, (Wallerstein Decl. ¶¶ 18, 19), as well as  
24 \$3,232.50 for 7.5 hours of attorney time spent waiting for the deposition to begin on January 21,

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26 <sup>7</sup> Almaxwave seeks reimbursement for Ferri's nine-night hotel stay. Counsel explains that to  
27 minimize deposition preparation expenses, his team prepared deponents both in groups and  
28 separately, necessitating Ferri's arrival in San Francisco on January 13, 2016, even though his own  
deposition was scheduled for January 21, 2016. Wallerstein Decl. ¶ 5. Plaintiff did not object to  
the length of Ferri's stay for purposes of Almaxwave's request for reimbursement of hotel  
expenses.



2016, (*id.* at ¶ 20), it did not submit any billing records to support the request. Within seven days of the date of this order, Almawave shall submit evidence to support its request for reimbursement of the costs of Ferri's air travel, as well as billing records supporting the attorney time spent preparing Ferri and attending the deposition. Almawave may redact any attorney-client privileged and/or attorney work product information from the billing records.

#### IV. CONCLUSION

For the foregoing reasons, Almawave's motions for sanctions filed at Docket Nos. 546 and 597 are denied. Docket No. 895 is granted in part and denied in part.

**IT IS SO ORDERED.**

Dated: January 6, 2017

